Special Issue on Civil Rights

The Real Facts Behind All That Dixie Oratory About Magna Charta

I. F. Stone's Weekly

VOL. V, NO. 24 JUNE 17, 1957 WASHINGTON, D. C. 15 CENTS

Why The South Now Stresses Trial by Jury

I

The jury trial issue has enabled the white South to take the offensive for the first time this year in its fight against civil rights legislation. Until now it has fought a defensive rear-guard action, hampered by its own bad conscience. It could not effectively, so soon after the defeat of Hitlerism and in a world of rising colored nationalism, fight equal rights for Negroes frankly on grounds of racial superiority. It could not hope really to carry on "massive resistance" to the Supreme Court without encouraging a lawlessness ultimately dangerous to those propertied interests for which its Byrds and Russells speak. It could not openly voice its true opinions. The homeland of Jefferson long ago passed over in philosophy to the Hamiltonian Whigs he fought. The real view of the oligarchy which rules the South is that men must naturally be governed (in Hamilton's phrase) by "the rich and well-born." The logic of inequality which once justified slavery and now supports a second class status for the Negro has always shaded over into a lordly contempt for the white poor. Emotionally and politically the South is an island of racialism and upper class class consciousness in a world otherwise aggressively egalitarian. Its true views are too anachronistic to make effective politics.

Racialism in Respectable Form

In this perspective the jury trial issue was a brilliant surprise maneuver. The racialists found themselves a slogan they could use without blushing, a symbol that made them appear to be leading the popular and democratic forces. Was not trial by jury a historic weapon for the defense of popular rights against oppression? On this issue, they could invoke symbols which command veneration. Was not trial by jury established in Magna Charta? Did not the colonists complain in the Declaration of Independence that George III had deprived them of it? Is it not guaranteed by the Constitution? Suddenly the South could appear to be the champion and defender of fundamental liberties. Its cherished racial myth about Anglo-Saxon supremacy could reappear in respectable form. Was not trial by jury a basic and precious possession of the Anglo-Saxon peoples, and was it not threatened by representatives of the lesser breeds, by Negro agitators and alien (often Jewish) radicals, virtually all of them Yankees and most of them from New York? The jury issue merged the appeal of great traditions with the covert racialist and Fascist tendencies which persist like a chronic paranoid infection in the mind of the South, with its strong inferiority and persecution complexes.

Instead of another dreary filibuster, the South had itself a crusade. The jury trial issue put the Northern liberals on the defensive and split their ranks. At the heart of the bill were those provisions allowing the Federal courts to enforce civil rights by injunction and contempt proceedings. But hadn't the liberals fought "government by injunction" as far back as the Debs case? Hadn't they campaigned for the anti-injunction provisions of the Clayton Act and later of the Norris-La Guardia Act? Hadn't they fought for labor's right to trial by jury for contempt of judicial orders? Weren't they now being inconsistent? So Kefauver and O'Mahoney as well as Butler were won over in the Senate Judiciary Committee to the Ervin amendment to guarantee jury trial in civil rights cases. Hennings put in a compromise measure allowing jury trials in criminal contempts, and Celler—fighting a hard long weary battle in committee and on the floor—was pushed into apologizing for his advocacy of the Norris-La Guardia Act as a kind of youthful aberration. Whether or not the jury trial amendment passes the House before this appears, it will be the focus of a long bitter fight in the Senate and the issue will haunt us for years to come. How best to meet it?

Resolute—To Keep Negroes From Voting?

"The California Peace Officers' Association, at the urging of Police Chief William H. Parker of Los Angeles asks Congress to be careful of any civil rights legislation which would hamper law-enforcement officers. . . . Parker declared the civil rights program offered by the Eisenhower Administration through Attorney General Herbert Brownell 'would put the police out of business.' He said he opposes a proposal to establish a Federal commission to investigate alleged civil rights violations by local law enforcement agencies. Parker declared such a group would play into the hands of Communists, 'who know they cannot bring about a revolution or make advances in the face of a resolute police force."

—Newspaper clipping put into the Congressional Record by Congressman Davis of Georgia, June 10.

II

When King John Bent The Knee

An effective answer cannot be made by challenging such sacred symbols of our folklore as Magna Charta, nor by the kind of intense hair-splitting over equity procedure in which the lawyers of the House have been engaging for days as this is written. If the white supremacists wish to start with Runnymede, we had best meet them on that same hallowed ground where (as Congressman Barden of North Carolina put it, with more fervor than accuracy) "the British people met King John and made him kneel and assure him that that privilege—trial by jury—must remain and be a part of their law."

Now the most important characteristic of the jury trial promised (to speak somewhat anachronistically) in Magna

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Charta is the very characteristic the white South would deny. Magna Charta says "no free man can be taken, or imprisoned, or exiled, or in any other manner destroyed, unless by the lawful judgment of his peers, or by the law of the land." What did "peers" mean? If we look at the original Latin the words used were "parium suorum" which means literally, "his equals." Magna Charta was a feudal document, product of a feudal world of fixed classes. The guarantee was that a man would be tried by men of his own rank and condition, not by his superiors or inferiors but by men of his own class. This is how Blackstone explained it centuries later.

Not the Negro's "Peers"

To allow the rights of a Negro to be determined by a jury of white Southerners today would be as repugnant to this basic idea in Magna Charta as allowing the rights of a small tenant farmer to be determined by a jury of barons, i.e. by men of a class hostile to his interests and anxious if it could to wipe out his rights in the land. This idea still hung on many centuries later in the principle that an alien indicted in England (and in many of our States) had a right to a jury "de medietate linguae," made up half of aliens. It is also embodied in the basic principle applied in American constitutional law where Negroes are defendants. As Mr. Justice Harlan said in a leading case involving a Negro in 1906, "What an accused is entitled to demand, under the Constitution of the United States, is that in organizing the grand jury as well as in the empanelling of the petit jury, there shall be no exclusion of race, and no discrimination against them because of their race or color." (*Martin v. Texas,* 200 U. S. 316). Where two races live together on as unequal a basis as do whites and Negroes in the South, an all-white jury is not that jury "of his equals" a Negro is entitled to demand if the South wishes to live up to the letter and spirit of Magna Charta. An all-white jury is a jury stacked by one side, neither the equals of the Negro whose rights are at stake nor fairly representative of the community in which both whites and Negroes live.

How does it happen that Negroes are rarely to be found even on Federal juries in the Southern States? Douglas of Illinois * called the attention of the Senate last Monday to the fact that the Republican dominated 80th Congress passed a law saying that any citizen over the age of 21 was competent to serve as a grand or petit juror in a Federal court *unless* he was "incompetent to serve as a grand or petit juror by the law of the State in which the district court is held." This was contrary, as Senator Douglas said, "to the recommendations of the famous Knox committee which wanted uniform Federal standards for the selection of Federal jurors." Senator Douglas said it would be interesting to know whether this was another instance of the kind of gentlemen's agreement so frequent between the Republican leadership and the Southern Democrats. The result was to subject the Federal jury system in the South to exactly the kind of covert racial discrimination which exists in its State courts. In many of these States, a man must by State law be eligible to vote in order to serve as a juror. The practice in the others is to pick jurors from the lists of registered or actual voters. This excludes most Negroes from jury service. Senator Douglas gave figures from nine Southern States on the proportion of Negroes of voting age not registered to vote. This ranged from a low of 59.8 percent not registered in Florida to a high of 96.1 percent not registered to vote in Mississippi.

An Admission and A Curious Argument

"I dare say that the chances of finding a Negro who had taken the trouble of registering or taken the trouble of paying his poll taxes, who had met the qualifications of an elector in the county, would be about one out of a thousand in a normal drawing of juries by chance so as not to have a fixed trial. The chances would be one to a thousand of having a Negro on the jury unless you deliberately put him there.

"With all the love and respect we have for people of all races, when the Chief Justice of the U. S. Supreme Court, or any other court, says that you have to hand pick and put on any jury a particular man, or a particular color of man, or a particular race of man, it amounts to jury picking, if not fixing, by the Supreme Court."

—Rep. Whitten (Miss.) on the civil rights bill, June 10.

How Juries Are Kept Lily White

These figures do not tell the whole story. The Knox report (so called from the name of Federal Judge John C. Knox, chairman of the committee which prepared it) disclosed that in the one-party South there is usually only one clerk and jury commissioner (both Democrats, of course) and they write to so-called "key men" in the community and ask them to suggest jurors. Senator Douglas said no one knew just how these key men are chosen but his information was "that in practice they are almost exclusively white Southern business men and white southern political and professional leaders." Should jury trials be provided for contempt of civil rights orders, Senator Douglas predicted, the jury lists "will be carefully winnowed, and the Negroes of the South will have very little representation on them." A registrar held in contempt for refusing to register qualified Negro voters would be tried—if the South has its way—under this lily white jury system.

A jury is supposed to be chosen at random and it is supposed to be impartial. Blackstone, another venerable monument of Anglo-Saxon law, says (Book IV, 350) that under the jury system a man can be found guilty only by "the unanimous suffrage of 12 of his equals and neighbors, indifferently chosen and superior to all suspicion," i.e. suspicion of partiality. It would be wrong to say that a Negro cannot get justice from a lily-white jury; there have been cases where such juries have decided against white men in favor of Negroes. But the instances are few. Such verdicts are unlikely where white supremacy becomes or is made the real issue. All too recent examples make it unnecessary to speculate on how lily-white juries in this atmosphere are likely to react if asked to enforce the Negro's right to vote or the Supreme Court's school decision.

During the bus boycott in Montgomery, several Negro churches were bombed and two destroyed. Two young white men were arrested and confessed during their preliminary po-

*** The indispensable documents in the voluminous literature already generated by this controversy are the brilliant memorandum on jury trial Senator Douglas put into the Congressional Record April 18 (pages 5356-63) and his exhaustive speech on jury qualifications June 10 (pages 7675-88). The Senator deserves highest praise.**

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lice interrogation. They were nevertheless acquitted by an all white jury on May 30 after a frank appeal by the defense for a verdict which would "preserve our sacred traditions." White supremacy, not the bombings, was the issue. Of the terrible Till case, we need note only that Congressman Jamie Whitten of Mississippi, in defending the independence of Southern juries during debate on civil rights June 10, did admit that since the acquittal in the Till murder "there have been magazine articles by the two defendants which would lend some weight to the belief that they might have been guilty." White supremacy outweighed even murder.

Less well known but directly relevant to the question of jury trials in civil rights enforcement is what happened last year in Ouachita Parish, Louisiana. The testimony given the House Judiciary Committee by the Attorney General of Louisiana last February 13 (it begins at page 988 of this year's House Judiciary Committee hearings on Civil Rights) was most misleading and elicited a factual but indignant response from Assistant Attorney General Warren Olney III (at page 1219 of the hearings or at page 7681 of the June 10 Congressional Record).

Neither Democratic Nor Republican

The testimony of Jack Gremillion, the Attorney General of Louisiana, and the rejoinder of Mr. Olney, provide a vivid example of how hostile lily white juries react even to election abuses thoroughly investigated and attested by the FBI. The FBI investigation showed how closely the Citizens' Councils controlled registrations, and how brazenly unfair were registrars. "Specifically," Mr. Olney wrote, "in the case arising from Ouachita Parish, the investigation by the FBI disclosed that the registrar of voters in examining applicants used a card on which was written an excerpt from the Constitution, which card was given to the registrar by the Citizens Council of Ouachita Parish." Apparently it was impossible for a Negro to interpret this correctly no matter what he said. "In one instance," Mr. Olney went on, "Mrs. Mae Lucky, registrar of voters of Ouachita Parish, asked an applicant for registration what our form of government was. The applicant replied, 'A democratic form of government.' The registrar said, 'That's wrong—try again.' The applicant said, 'We have a Republican form of government.' The registrar then said that that answer too was wrong and that the applicant would have to return after the next election to reregister." In another Louisiana Parish, Caldwell, also investigated by the FBI, the registrar "even refused to accept white persons as witnesses for Negro voters on the grounds that the witnesses were of a different race from the race of the challenged voters."

By such methods, on the eve of the 1956 elections, the number of registered Negro voters in Ouachita Parish was reduced from approximately 4,000 to 694. In Bienville Parish, 560 of the 595 Negro voters were stricken from the rolls. In Jackson Parish, 951 of the 1,222 Negro voters were stricken. The results of the FBI investigations in 10 parishes were submitted to a Federal grand jury without eliciting a single indictment. Indeed, "after deliberating in private," Mr. Olney reports, "the grand jury announced through its foreman that it had determined that there was no possibility of indictments being returned in the Bienville, Jackson and Ouachita Parish cases even though the evidence was presented to them and a full inquiry conducted. The grand jury went on record as not desiring to hear any testimony in connection with these latter cases." When a jury says it does not wish to hear testimony and will not be swayed by evidence, the jury system has broken down completely. That is, the jury system as it exists in the South, where Negro rights are determined by lily white juries. This is why a jury trial amendment would wreck the civil rights program.

Lenin, Hitler and Jury Trial!

"When the Russian revolution took place and the Bolsheviks took over, there has not been a jury trial in Russia since that time. When Hitler took over, with one strike he abolished the states and all jury trials. Did this help minority groups? Did this preserve anybody's civil rights?"

—Rep. Barden (N.C.) in the House, June 10.

III

What, then, is the alternative? The Constitution, in Article III, says "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ." But the Constitution also recognizes and incorporates the two types of adjudication developed by England, law and equity. It says "The judicial Power shall extend to all Cases, in Law and Equity. . . ." And there was no right to trial by jury in equity. Madison's Notes on the Constitutional Convention shows a suggestion that civil cases at law be tried by a jury was rejected because as Nathaniel Gorham of Massachusetts argued, "It is not possible to discriminate equity cases from those in which juries are proper." The idea that juries were not "proper" in equity was taken for granted.

Long Before Those Good Men Proved True

It took close to five centuries after Runnymede before the jury developed into its modern form and its twelve good men and true were anywhere good enough to resist the wishes of the Crown and the great landowners. Long before then appeal to the Chancellor, the "keeper of the King's conscience," enabled English peasants to obtain some protection against arbitrary exactions by their lords, and to establish some form of tenure in the land they tilled. From the 15th Century onward, "equity" developed in England as it once had in ancient Rome as (1) a means of mitigating the often harsh rigidity of the law and (2) as a means of preventing wrong. Instead of waiting for a crime to be committed, the intended victim could apply for an order forbidding an enemy to commit the wrongful act. This was the beginning of "injunction" and violations of injunction were punished by trial without a jury as a "contempt" of court. A judge in equity could imprison a man until he obeyed the order of the court or he could send him to jail for a fixed term for violating that order. These are commonplaces of the law, nowhere more fully understood than in the South. The earliest authoritative decision on the contempt power in the state courts was in Mississippi (*Watson v. Williams*) and one of the fullest and most cogent analyses was by the Supreme Court of Virginia in *Carter's Case*. This is the procedure envisaged for enforcing civil rights. Where orders of the court were violated the accused would have full rights of trial and appeal, but it would be trial by judge, not jury.

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The Purpose Was Preventive

The purpose was not to avoid jury trial. The purpose was to *prevent* infractions of civil rights before they occurred rather than to punish them by the criminal law afterwards. Equity in this sense is "preventive law"—it puts an official on notice that if he commits a certain act or fails to take a certain step he will be in contempt of court. This is the mildest of the methods the Federal government could take to enforce Federal rights. The wholesale denial of voting rights in the one party South could be the basis of Federal intervention under Article IV which says the United States "shall guarantee to every State in this Union a Republican form of Government." (That registrar in Ouachita Parish was right in the sense that what the South really has is neither a republican nor a democratic form of government but a scarcely veiled oligarchy). The Federal government could cut down the representation of the Southern States in Congress for restricting the right to vote. For the 14th amendment says, "when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being 21 years of age, and citizens of the United States, or in any way abridged . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in such State." The Federal government could take over the election machinery in the Southern States under the plenary power given it by the 15th amendment to enforce "by appropriate legislation" the provision that no State shall deny or abridge any citizen's right to vote "on account of race, color or previous condition of servitude." If Northern whites were not basically indifferent to Negro rights, the Negro's second class status in the South would have been ended long ago. The proposal to use Federal equity powers is the most cautious and least drastic of all the methods Congress might use to protect the Negro's rights. The oppressed Negro today, like the English serf centuries ago, must look to equity procedure for justice.

As Mississippi's Governor Sees It

Mr. [Lester] HOLTZMAN (D. N. Y.). Do you think, Governor, that if we pass this legislation less than 1 per cent of the Negroes eligible to vote in Mississippi will actually be voting?

Governor COLEMAN. I do not think it will change the voting situation in Mississippi in any event. It might reduce it although you could be justified in saying it is already at an irreducible minimum.

—House Judiciary Hearings on the Civil Rights Bill, 739-44.

Surprised That Judges Did Their Duty

To raise the issue of jury trial was implicity to declare that the South could not trust Southern Federal judges. This never occurred to the South's leaders until recently. C. Vann Woodward in his revolutionary little book on "The Strange Career of Jim Crow," which everyone interested in the subject should read, explains how the South's hopes of nullifying the Supreme Court's education decision were raised by its referring of enforcement to local judges. "The old four handed American game between the South, the courts, the Negro and the Constitution has been going on throughout our history," Professor Woodward, himself a Southerner, writes, "and the South knew all the moves. For much the greater part of that period, the courts had played into the hands of the South and the game had gone against the Negro. If now the Supreme Court had changed partners, one could still place one's hopes in the district judges, many of whom were natives of the states in which they sat. This hope was most explicitly voiced by Lieut. Governor Ernest Vandiver of Georgia, who rejoiced that 'they are steeped in the same traditions that I am. . . . A "reasonable time" can be construed as one year or two hundred. . . . Thank God we've got good Federal judges'." This attitude changed when Southern born Federal judges began to demonstrate that they put their duty ahead of their prejudices. Now the cry goes up for trial by jury because the South feels that it can control the juries, keep them lily white and depend on them to nullify any civil rights laws or orders.

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NEWSPAPER

Entered as Second Class Mail Matter Washington, D. C. Post Office

I. F. Stone's Weekly. Entered as Second Class Matter at Washington, D. C., under the Act of March 3, 1879. Post-dated Mondays but published every Thursday except the last two Thursdays of August and December at 5618 Nebraska Ave., N.W., Washington 15, D. C. An independent weekly published and edited by I. F. Stone; Circulation Manager, Esther M. Stone. Subscription: $5 in the U. S.; $6 in Canada; $10 elsewhere. Air Mail rates: $15 to Europe; $20 to Israel, Asia and Africa.

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